IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1670

In the Matters of BRUCE MICHAEL LEVY, CLAUDIA MANN, BRUCE VANDER MALLE,

Handicapped Children.

JOSEPH W. LEVY, HERBERT MANN, HAROLD A. VANDER MALLE,

Appellants,

-against-

CITY OF NEW YORK, et al.,

Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

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QUESTION PRESENTED

Do the New York Family Court Act Sections 232(a)(i) and 234 under which a parent may be required to contribute, according to his financial resources, to the

maintenance, as distinct from tuition, expenses of his handicapped child at a special residential school violate the equal protection or the due process clause of the United States Constitution?

STATEMENT OF THE CASE

Each of these four consolidated appeals arises from a handicapped child proceeding pursuant to New York Family Court Act Sections 232 and 234. Two appeals (the Levy appeals) are from orders of the New York Family Court involving the same child and entered December 3, 1974; the other two appeals are from orders of the New York Family Court, entered November 29, 1974, involving different children. All four orders granted applications for payment of full tuition at a special residence school, as well as transportation expenses thereto, for a handicapped child.

However, three orders denied, after examination of the parent's financial resources, that part of the application requesting maintenance payment. The fourth order, made after a similar assessment of the parent's resources, directed the parent to contribute $1,200 or one-third of the maintenance expenses.

Both Family Court judges held that there is no constitutional infirmity in New York Family Court Act Sections 232 (a)(i) and 234 under which a parent may be required to contribute, according to his financial resources, to the maintenance expenses of his handicapped child at a special residential school. The decision of the Family Court in the first two cases is reported sub nom. Matter of Logel at 78 Misc. 2d 394. The other two Family Court orders are without written opinion.

The Family Court opinion distinguishes expenses of board and lodging (maintenance) from tuition costs, towards which a parent may not be required to contribute under the New York State Constitution, and holds that a parent may be required to contribute to "basic necessaries" for the maintenance of a child while in a residential setting. 78 Misc 2d at p. 395. That Court found it apparent from the "general sense of statutory law" that, while the legislature had imposed upon the community the "basic obligation" of providing a public education for all children, including the handicapped, it was "equally clear" that the "basic obligation to provide for food, lodging, clothing, and other necessaries for the child" remained upon the parent. 78 Misc 2d at p. 397.

Rejecting the claim that the "special consideration" extended to blind and deaf children rendered the provisions as to handicapped children unconstitutional as violative of equal protection, the Family Court stated that it was not for the courts to deem "unwarranted" or "irrational" the "legislative recognition of the peculiar gravity of the hardships of blind and deaf children and their parents" and to override the traditional extension to them by the legislature of "special and unique" consideration for their welfare in the form of maintenance support at state schools as an act of largess or public charity. 78 Misc 2d at pp. 398-399.

On the appellants' direct appeal to the New York Court of Appeals, the City took the position that, while it

would not be permissible under the New York State Constitution to require a parent to contribute to the child's tuition expenses*, no such bar exists to requiring parental contribution to maintenance costs. Further, the City contended that authorization for such contribution is uniform throughout the State under New York Family Court Sections 232(a)(i) and 234.**

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*The City agrees that tuition expenses include tuition costs for the summer months, as well as the traditional school year, and transportation costs to and from the school.

**This contention was in response to another equal protection claim, rejected by the New York Court of Appeals and not raised here by appellants, of geographical discrimination premised on the theory that only New York City residents, not parents outside the City, could be required to contribute to maintenance costs.

The New York Court of Appeals unanimously affirmed with an opinion. 38 N.Y. 2d 653, 345 N.E. 2d 556. Addressing itself directly to the equal protection claim appellant now puts before this Court, that Court initially ruled that handicapped children do not constitute a "suspect classification" and, consequently, the appropriate standard for review of the legislative action was the traditional rational basis test. 38 N.Y. 2d at p. 658, 345 N.E. 2d at pp. 558-559. The Court reviewed the special privileges and assistance extended to the blind and the deaf "as a matter of tradition and history" by New York State and the federal government* and found that there was a

*The special privileges and benefits extended to the blind by the federal government include additional exemption for income tax purposes (Internal Revenue Code, 26 U.S.C. §151); disability benefits under
(footnote cont'd. on following page)

a rational basis for "the distinction made in relieving the parents of blind and deaf children from any financial responsibility in connection with their children's education." 38 N.Y. 2d at p. 658, 345 N.E. 2d at p. 559. Weighing the significance of "historical practice" in an equal protection challenge where the measure of the legislative action is rationality, the Court stated (38 NY 2d at pp. 659-660, 345 N.E. 2d at pp. 559-560):

> "We think that the Legislature acts rationally when, in the exercise of its authority and responsibility to identify concerns of the State and to make provision with respect thereto, it takes into account

*(footnote cont'd. from previous page). the Social Security Act "without regard to ability to engage in any substantial gainful activity" (20 CFR §404. 1501 (b); see Ferguson v. Celebrezze, 232 F. Supp. 952, 955-956 [W.D.S.C. 1964]); free mailing privileges (39 U.S.C. §§3403, 3404); special consideration in payment of veterans benefits for certain cases of blindness and deafness (38 U.S.C. §360).

distinctions which carry the imprimatur of historical authenticity, provided that such distinctions are not the reflection of invidious discrimination and have not been demonstrated to be irrational by knowledge subsequently acquired. It strikes us as unintelligent to say that the decisions made in the past and the value judgments of those preceding us who were then responsible for identifying the priorities of governmental concern and response must be wholly ignored unless the determinations which were then made can be justified, ab initio, when measured by today's criteria and standards. This is not to say that we may today complacently accept the wisdom and unwisdom of the past. It is to say, on the other hand, that the policy judgments and the priority determinations of our history are not totally to be rejected, especially when those judgments and determinations have enjoyed public acceptance for a long period of time. As we have said in another context: (While antiquity is not an infallible criterion for determining the scope of constitutional rights, traditional usage and understanding is helpful in defining the privilege against

self incrimination.)

. . . Government, and particularly, the legislative branch, acts responsibly when it reflects the concerns and interests of the governed except when to do so would be to trespass on constitutionally protected rights. Obviously choices must and will be made; priorities must and will be set. This is the essence of the legislative process. Were the financial resources available to State government unlimited, this would not be necessary and might not be desirable. It would be unthinkable, however, to suggest that confronted with economic strictures State government is powerless to move forward in the fields of education and social welfare with anything less than totally comprehensive programs. Such a contention would suggest that the only alternative open to the Legislature in the exercise of its policy-making responsibility, if it were to conclude that wholly free education could not be provided for all handicapped children, would be to withdraw the benefits now conferred on blind and deaf children - thus to fall back to an undifferentiated and senseless but categorically neat policy that since all could not be beneifted, none would be."

APPLICABLE STATUTES

New York Family Court Act

"§232. Educational and medical service

(a) The family court has jurisdiction over physically handicapped children.

(1) Education service. In the case of a physically handicapped child, the court may accept the certificate of the state department of education as to his educational needs, including home teaching, transportation, scholarships, tuition or maintenance. If it shall appear to the court that any child within its jurisdiction is mentally retarded, the court may cause such child to be examined as provided in the mental hygiene law and if found to be mentally retarded as therein defined, may commit such child in accordance with the provisions of such law. Whenever a child within the jurisdiction of the court and under the provisions of this act appears to the court to be in need of special educational training, including transportation, tuition or maintenance, and, except for children with retarded mental development, home teaching and scholarships,

a suitable order may be made for the education of such child in its home, a hospital, or other suitable institution, and the expenses thereof, when approved by the court and duly audited, shall be a charge upon the county or the proper subdivision thereof wherein the child is domiciled at the time application is made to the court for such order;

(2) Medical service. A parent or other person who has been ordered by the commissioner of health of a county or part-county health district, the medical director of a county physically handicapped children's program, or the health services administration of the city of New York, to contribute to the cost of medical service authorized under section two thousand five hundred eighty-two of the public health law, may petition the family court to review such order and determine the extent, if any, of his financial liability. Whenever a parent or other person who has been ordered to contribute to the cost of medical service authorized pursuant to section two thousand five hundred eighty-two of the public health law refuses or fails to make such contribution, the health commissioner or the medical director of the physically handicapped

children's program, as the case may be, may institute a proceeding in the family court to compel such contribution.

(b) Whenever a child within the jurisdiction of the court appears to the court to be in need of medical, surgical, therapeutic, or hospital care or treatment, a suitable order may be made therefor.

(c) "Physically handicapped child" means a person under twenty-one years of age who, by reason of a physical defect or infirmity, whether congenital or acquired by accident, injury or disease, is or may be expected to be totally or partially incapacitated for education or for remunerative occupation, as provided in the education law, or is physically handicapped, as provided in section two thousand five hundred eighty-one of the public health law.

§233. Compensation and liabil-ity for support and care in counties outside the city of New York

(a) Whenever a child is detained, placed or committed under the provisions of this act to an authorized agency, or to any person other than his parent or

other person legally chargeable with the expense of his maintenance, and is retained in accordance with the rules of the state board of social welfare, compensation for his care and maintenance shall be in a charge on the county, except that if the child resides or is found in a city public welfare district located in the county, such compensation shall be a charge on such city public welfare district, unless otherwise agreed by and between the county and city. The compensation paid by the county for care and maintenance of the child may be charged back to a city or town in the county in accordance with and to the extent permitted by the provisions of the social welfare law. All bills for such care and maintenance to be paid from public funds shall be paid by the county or city treasurer from moneys appropriated for public relief and care in the county or city public welfare district by warrant of the commissioner of public welfare.

(b) The court may, after issuance and service of an order to show cause upon the parent or other person having the duty under the law to support such child, adjudge that such parent

or other person shall pay to the court such sum as will cover in whole or in part the support of such child, and willful failure to pay such sum may, in the discretion of the court, be punished as a criminal contempt of court. When a person liable to such payment on order, as herein provided, is before the court in the proceeding relating to the commitment, a formal order to show cause may be dispensed with in the discretion of the court.

* * *

§234. Educational service in counties within the city of New York

(a) If it shall appear to the court that any child within its jurisdiction is mentally retarded, the court may cause such child to be examined and if such child shall be found to be mentally retarded within the meaning of the mental hygiene law, the court may commit such child in accordance with the provisions of such law. In the case of a child within its jurisdiction, after satisfactory proof of the need thereof the court may make an order for his (i) maintenance, (ii) transportation, (iii) education, (iv) tuition, and, except for children with retarded mental

development, (v) home teaching or (vi) scholarships.

(b) Whenever the court makes an order for any service set forth in this section, the court may after proper hearing issue an order directing the person or persons liable under the law to support such child to pay a part or all of the expense of such service, (a) in the manner provided elsewhere in this act for the support or partial support of a child committed by the court or (b) proceed directly at the time the order for such service is made to inquire into and determine the liability of any such person and may by order require such person to pay part or all of the expense of such service in a lump sum or in such weekly or monthly installments as the court may decide. The procedure specified in (b) shall be followed in the case of any child who is physically handicapped as defined in paragraph one of subdivision a of section 556-18.0 of the administrative code of the city of New York. The court may issue a summons or in proper instances a warrant for the appearance of the person alleged to be liable.

§235. Compensation and liability for support and care in counties within the city of New York

(a) Upon the detention, placement or commitment of a child by the family court in a county within the city of New York to a public or private institution other than a shelter maintained and conducted by a society for the prevention of cruelty to children, the department of social services of the city of New York shall investigate the ability of the parent of the child, or other person legally chargeable, to contribute in whole or in part to the expense incurred by the city of New York on account of the maintenance of such child.

(b) If in the opinion of the department of social services such parent or legal custodian is able to contribute in whole or in part the commissioner of social services shall thereupon institute a proceeding in the family court to compel such parent or person legally chargeable to contribute such portion of such expense on account of maintenance of such child as shall be <u>proper and just</u>.

(c) In any case where an order has been granted pursuant to section 556-18.0 of the administrative code of the city of New York, the health services

administration, under the conditions specified in such section, may institute a proceeding in the family court to compel the parents of a child for whom care, treatment, appliances or devices have been ordered pursuant to such section, or other persons legally chargeable with the support of such child, to contribute such portion of the expense of such care, treatment, appliances or devices as may be just, by payments in installments or otherwise. Whenever the board of education of the city shall issue an order pursuant to section ten hundred nineteen-a of the education law, the health services administration, after investigating the financial responsibility of the parents of a child benefited by such order or of the persons legally chargeable with the support of such child, may institute a proceeding in the family court to compel such parents or persons to contribute, in installments or otherwise, such portion of the expense of providing such benefits as may be just."

New York Education Law

"§4403. Procedure through family court; cost of educational services

1. The state education department shall have the power and duty to provide within the limits of the appropriations made therefor, home-teaching, transportation, scholarships in non-residence schools, tuition or maintenance and tuition in elementary, secondary, higher, special and technical schools, for handicapped children in whole or in part from funds of the department, when not otherwise provided by parents, guardians, local authorities or by other sources, public or private. When the family court, or the board of education of the city of New York, shall issue an order to provide for the education, including home-teaching, transportation, scholarships, tuition or maintenance, of any handicapped child the commissioner of education, if he approves such order, shall issue a certificate to such effect in duplicate, one of which shall be filed with the clerk of the board of supervisors or other governing elective body of the county or chief fiscal officer of a city and one in the office of the commissioner of education."

ARGUMENT

AS CONSTRUED BY THE NEW YORK COURT OF APPEALS, NEW YORK FAMILY COURT ACT SECTIONS 232 (a)(i) AND 234 AUTHORIZE THAT COURT, BOTH EXPRESSLY AND IMPLIEDLY FROM THE GENERAL STATUTORY SCHEME, TO ENTER AN ORDER REQUIRING SOME MEASURE OF CONTRIBUTION BY THE PARENT, ACCORDING TO HIS FINANCIAL RESOURCES, TOWARDS THE MAINTENANCE PORTION OF THE EXPENSES OF THE SPECIAL EDUCATIONAL SERVICES REQUIRED BY THE HANDICAPPED CHILD. A COURT ORDER DIRECTING SUCH CONTRIBUTION DOES NOT VIOLATE THE EQUAL PROTECTION OR DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

There is no argument here as to the right of a handicapped child in New York State to a free education. See New York State Constitution, Article II, Section 1; New York Education Law § 3202(2); Wiltwyck School for Boys Inc. v. Hill, 11 NY 2d 182 (1962). Indeed, that right is further secured to the handicapped child by the statutory provision of the free

specialized educational training required. New York Education Law § 4403; New York Family Court Act §§ 231 et seq. What is involved here is not, as appellants urge, the handicapped child's right to a public education, but the merit of the claim that the operation of that right should be extended to relieve the handicapped child's parent of his primary obligation of support as far as supplying the everyday needs of the child.

The New York State Constitution requires that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated" (Article 11, §1). Additionally, the Constitution permits but does not require the Legislature to provide "for the education and support of the blind, the

deaf, the dumb, the physically handicapped, the mentally ill, the emotionally disturbed, the mentally retarded or juvenile delinquents as it may deem proper" (Article 7, §8, Emphasis supplied). Thus, more specifically, what is involved here is a distinction between the state's constitutional obligation to provide a free public school education and the permissible granting of public funds for the maintenance of blind and deaf children as an act of public charity. See People ex rel. The New York Institution for the Blind v. Fitch, 154 N.Y. 14, 34 (1897).

(1)

Under Article 89 of the Education Law, the State Education Department is responsible for the education of handicapped children and when there are no adequate public facilities for the education of such children "to contract with an educa-

tional facility located within or without the state, which in the judgment of the department, can meet the needs of such child" (§4407[1]). Further, the Department is responsible for the provision, if necessary, of tuition and maintenance in a special school "when not otherwise provided by parents, guardians, local authorities or by other sources, public or private" (§4403[1]).

The statutory scheme established in Article 2, Part 3 of the New York Family Court Act gives that Court the authority to provide special educational services for handicapped children and to enter an order requiring those charged with such a child's support to contribute to his maintenance

expenses. The authority given to the New York Family Court under Sections 232 and 234 is related to the operation of Section 4403 of the New York Educational Law. Report of Joint Legislative Committee on Court Reorganization (Vol. II, Family Court Act, Jan. 30, 1962), at pp. 42-43.

Article 2, Part 3 of the Family Court Act, together with the relevant sections of the Education Law, authorizes, as construed by the New York Court of Appeals, the Family Court, both within and without New York City, to enter as part of a "suitable order" for education of a handicapped child an order requiring parental contribution for maintenance.

(2)

In accordance with the powers granted to it under Article 7, §8 of the New York Constitution, the New York Leg-

islature has deemed it proper to provide for the free support and education of deaf and blind children in certain specified institutions (Education Law, §4201), wherein such unfortunate children are "provided with board, lodging and tuition" (Education Law, § 4204 [deaf children]; § 4207 [blind children]). In furtherance thereof the State has maintained since 1865 the New York State School for the Blind at Batavia (Education Law, Article 87) and the New York State School for the Deaf at Rome (Education Law, Article 88). In addition, there are five schools for the deaf and five other schools for the blind subject "to the visitation of the commissioner of education" who has broad supervisory powers in the operation of such schools (Education Law, § 4201). This statutory

scheme which provides a free education including maintenance for blind and deaf children is specifically limited to the state operated and supervised schools for the blind and deaf (Education Law, §§4201, 4204, 4207). It does not include other private or out of state institutions for the blind and deaf, which are not subject to state supervision and whose school contracts are therefore governed by Article 89 of the Education Law.

Historically, the blind and deaf have long been the object of special governmental solicitude, and, it is submitted, the special provisions made for the education of blind and deaf children under Article 85 of the Education Law represent nothing more than legislative recognition of the peculiar gravity of the hardships imposed upon such children and, perhaps

in some small measure, the tragedy visited upon their parents.* Further, these handicaps, blindness and deafness, in addition to their seriousness, are quite clearly identifiable and the degree of such handicaps is easily ascertainable. In contrast, in the case of many other claimed handicaps the relative severity of such handicaps is not at all easily ascertainable.

Appellants argue that a distinction among such different types of handicaps is a "suspect classification... subject to strict scrutiny" (App. Br., p. 16). Indeed, appellants premise their equal protection argument on the acceptance of this novel theory, which

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*The federal government has traditionally extended special privileges and benefits to the blind and deaf, including those mentioned in the New York Court of Appeals opinion, 38 NY 2d at p. 659, 345 N.E. 2d at p. 559.

takes up a major portion of their brief (pp. 12-28). However, the few cases, in the plethora of cases cited by appellants, bearing on the education of handicapped or retarded children do not support appellants' view, but, to the contrary, assume the application of the traditional rational basis test. New York State Association for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y., 1972); Pennsylvania Association for Retarded Children ("PARC") v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa., 1972); Mills v. Board of Education, 348 F. Supp. 866 (D.D.C., 1972); LeBank v. Spears, 60 F.R.D. 135, 137, fn. 13 (E.D. La., 1973). Moreover, other than the Rockefeller case, these cases dealt with an evil not present here - the total exclusion of handicapped children from the public school system either because,

as in PARC, the State concluded they were uneducable and untrainable or because, as in Mills, the State contended there were insufficient funds to educate them. The PARC-Mills rationale is that a state which does not have adequate public school facilities may well have to provide tuition grants for special private education in order to comply with the equal protection clause. Further, the "stigma" to be avoided, which was discussed in PARC, and is referred to here by appellants, was not the classification "mentally-retarded" but its erroneous application to a normal child because of insufficient data by the school in the individual case (343 F. Supp. at p. 295). Neither the possible stigma of the label "handicapped" nor the exclusion of handicapped children from public education is

at issue in this appeal, which is restricted to an economic issue: Whether a parent may be required to contribute to the non-educational expenses of board and lodging.

Equal protection does not require the state to limit its broad discretion to classify as long as its classification has a reasonable basis. Graham v. Richardson, 403 U.S. 365, 371 (1971); McGowan v. Maryland, 366 U.S. 420, 425-427 (1961). Nor is a rational classification constitutionally offensive merely because it is not made with mathematical nicety or because it results in some equality. Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78 (1911).

Further, a reform may deal with one step at a time, addressing itself to that phase of the problem which seems most acute to the legislative mind. McDonald v. Board of Education, 394 U.S. 802, 809

(1969); AFL v. American Sash Co., 335 U.S. 538 (1949); Semler v. Dental Examiners, 294 U.S. 608 (1935). "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

In New York State Association for Retarded Children v. Rockefeller, supra, 357 F. Supp. 752, cited by appellants, the Court rejected the claim advanced by representatives of the residents of the New York Willowbrook State School for the Mentally Retarded that they were being denied their equal protection right to a free public education suited to their needs and capabilities in contrast to children of normal mental ability. The Court stated (357 F. Supp. at pp. 762-764):

"The plaintiff class has not been singled out by the use of suspect criteria. Nor does the alleged denial of a public education infringe a fundamental right.... San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).... ...It would appear that if there is no constitutional infirmity in a system in which the state permits children of normal mental ability to receive a varying quality of education, a state is not constitutionally required to provide the mentally retarded with a certain level of special education...

New York has a complicated statutory framework for providing education to the children of the State - both normal and handicapped. The level and quality of education provided to the mentally retarded does not approach what the plaintiffs assert is necessary. To meet the varying demands, New York must allocate finite resources among many worthwhile and necessary programs. It has done so in a rational manner. Having recognized the need, there is no constitutional duty to supply the need in full....

The allocation of state resources among conflicting needs is a matter for the state legislature, if there is a rational basis and

other constitutional rights are not violated. Jefferson v. Hackney, 406 U.S. 535 ... (1972)."

The foregoing analysis also defeats the due process claim here advanced by appellants. Richardson v. Belcher, 404 U.S. 78, 84 (1971).

To extend to other handicapped children the benefits provided to the blind and deaf is solely a matter of legislative discretion. This task the courts ought not to perform, especially in view of the fact that the New York Legislature recently refused to enact such an extension.*

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* In 1974 Senator Cammerer introduced a bill (S. 7074) which proposed amendments to New York Education Law, with the same benefits given to blind and deaf children. The failure of the New York Legislature to adopt these amendments only emphasizes the fact that a distinction is deemed still to exist between the blind and deaf and other handicapped children, and indicates a relatively current legislative judgment not to extend the state's charity to other handicapped children, regardless of their parent's ability to support them.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED.

June 9, 1976.

Respectfully submitted,

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